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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 369

THE UNITED STATES, PETITIONER

v.

GLADYS E. MCCONVILLE, ADMINISTRATRIX OF THE GOODS, ETC. OF FRANK J. MCCONVILLE, DECEASED, FOR AND IN BEHALF OF HERSELF AS WIDOW AND JAMES MCCONVILLE, NEXT-OF-KIN AND HEIR AT LAW OF THE DECEDENT, AND GLADYS E. MCCONVILLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above cause on July 2, 1952.

OPINIONS BELOW

The opinion of the district court (R. 139-148) is not officially reported. The opinion of the court of appeals (R. 163-168) is reported at 197 F. 2d 680.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1952 (R. 168). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Government is liable under the Tort Claims Act for injuries caused by an employee driving a government vehicle solely for his own private purposes, having obtained permission of his superiors to use the vehicle through fraud.

STATUTE INVOLVED

Sections 1346(b) and 2671 of Title 28 U. S. C. (reenacting similar provisions of the Federal Tort Claims Act)[1] provide in pertinent part:

> Section 1346. *United States as defendant.*
>
> * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a

[1] The Federal Tort Claims Act (60 Stat. 842, 28 U. S. C. 921 *et seq.*) was repealed when its provisions were revised and reenacted into law as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948 (62 Stat. 683, 862).

private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Section 2671. *Definitions.*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

STATEMENT

Respondent, suing the United States under the Federal Tort Claims Act, was injured and her husband was killed in a collision with a United States Air Force ¾-ton truck at 2:00 a. m. on October 12, 1948, at the intersection of Sunrise Highway and Bayview Avenue in Freeport, Long Island.

At the time of the collision, Sgt. John R. Anderson, the Government driver, was returning from a personal frolic at various bars where he had been drinking beer with companions (R. 66-68, 166). An autopsy of respondent's husband disclosed that

he had been driving while intoxicated (R. 77, 143). Respondent, his only passenger, suing as administratrix of his estate and in her own behalf, alleged in her complaint that the collision was caused by Anderson's negligence while acting within the scope of his employment as a soldier in the United States Army (R. 3). The answer denied these allegations, alleged contributory negligence, and asserted affirmatively that Anderson was outside the scope of employment because he had procured and operated the Government vehicle "without proper and legal authority and by fraud and misrepresentation" (R. 8). The Government's position at trial was that Anderson had used a subterfuge to get the truck for a personal junket; hence, that his entire trip—not merely the deviation to the bars—was personal, not on Government business, and not within the scope of his employment (R. 9, 93, 96).

Anderson, called as respondent's witness on the issue of scope of employment, testified that he was stationed at the Air Force Base at Mitchel Field, Long Island, where he was in charge of the shoe repair shop (R. 57); that on the evening of the accident he was also in charge of the quartermaster warehouse with the duty of issuing and receiving supplies (R. 60); that he had spent part of the evening drinking beer at the WAC Recreation Hall with other enlisted men, including Sgt. Robert F. Goodwin, Cpl. Frank W. Brenner and Cpl. C. S. Warndel (R. 91); that shortly after eleven, after the Recreation Hall stopped selling beer and closed, he and his companions went to a latrine in

a barrack building where they drank some more beer (R. 93, 98, 100); that he later went to the Quartermaster Building and that there a lieutenant whom he could not identify came in and requested a bed and mattress (R. 60, 61, 90, 98-99), which were stored at the Santini Warehouse, a quartermaster depot located about two miles away, just off Mitchel Field (R. 61-62, 101). He said he told the officer he would be back within 15 to 30 minutes (R. 62, 67, 90). Since he needed transportation to get to Santini, Anderson telephoned the Officer of the Day, told him the circumstances, and received permission to have the motor pool issue him a truck for this purpose (R. 60-64). Having obtained the truck, Anderson testified that he returned to the latrine and picked up Goodwin, Brenner and Warndel, and together the four drove off (R. 64, 65, 91-92, 102.)

The route to Santini required Anderson to drive one mile south and then one mile east on the roads bordering the western and southern sides of the Field (R. 101, 106-108). Instead, he drove south for a short distance, then turned southwest to a bar where he and his companions had some beer. Thereafter, continuing in a southwesterly direction, they drove to the town of Oceanside, seven miles from the Field and from the Santini Warehouse, where they visited two other bars (R. 66, 67, 109-110).[2] Afterward, Anderson testified, he

[2] On the basis of maps submitted on argument and in evidence, the appellate court took judicial notice that Oceanside is seven miles from the Field and Santini, not five miles as stated in the district court opinion (R. 142).

left his companions and started alone in the direction of the warehouse (R. 68, 109-110). The accident occurred at 2:00 a. m. when he had completed two miles of the seven-mile return trip (R. 111, 142).

At the trial, the Government offered to prove through the testimony of Brenner and Goodwin (R. 129-132), two of Anderson's drinking companions, that Anderson had obtained the truck through deception and that the story about an officer's request for a bed and mattress was concocted by Anderson as part of a scheme to enable him to drive off the base with his companions so that they could continue their beer-drinking elsewhere after the Recreation Hall closed (R. 9, 93, 96). The district judge excluded the testimony (R. 130, 132). He found that the accident had been caused by Anderson's negligence and that the decedent was not contributorily negligent. Relying upon New York's "permissive use" statute (R. 10, 144), which imposes liability upon the owner of a vehicle who permits another to drive it (without regard to scope of employment),[3] he held that Anderson was operating the truck with the permission of the Government and within the scope of his employment (R. 147). Accordingly, he held that the United States was liable, awarding damages in the total amount of $60,800 and costs.

On appeal, the Court of Appeals for the Second Circuit modified the judgment by striking an item

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[3] N. Y. Vehicle and Traffic Law, § 59 (McKinney).

of costs, but affirmed on the merits. The court held that since Anderson's trip was authorized for a claimed proper purpose, "whether or not the claim was fraudulently made", he was "engaged in permissible activity for the army" when he began his trip (R. 166). The court apparently assumed that the junket to Oceanside was a temporary abandonment of his scope of employment, but held that it could not be said that as a matter of law Anderson had not reentered the scope of employment when he completed two miles of the seven-mile trip returning from his frolic; that, consequently, there was no need to consider the applicability of New York's permissive use statute. On the primary issue presented by this petition, the court held that the exclusion of the evidence relating to Anderson's having obtained the truck by fraudulent representations was not prejudicial because such evidence "could have no bearing on the scope of Anderson's employment under the Tort Claims Act. * * * [P]roper authorization for a trip whose claimed purpose was permitted by regulations was all that needed to be established" (R. 167).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Government was liable under the Tort Claims Act even if the employee had fraudulently obtained the vehicle for his private purposes, having misrepresented to his superiors that there was government business requiring his use of the vehicle.

2. In holding that, after an admitted deviation, the employee returned to the scope of his employment when he had travelled part of the way back to his claimed destination.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The court below has held it to be immaterial whether the employee in this case obtained the government vehicle by fraud—by fabricating a need for official business to elicit permission of his superiors to use the vehicle when his actual purpose was a purely personal, wholly unauthorized, pleasure expedition. It is sufficient, the court has held, if the soldier had "proper authorization for a trip whose *claimed purpose* was permitted by regulations * * * (R. 167; emphasis added), so that evidence showing that the formally "proper authorization" was secured by fraud was correctly excluded. This holding, we submit, reads out of the Tort Claims Act the basic provision that the Government is liable only where the employee whose conduct is complained of was "acting within the scope of his office or employment * * *." 28 U. S. C. 1346(b), *supra*, p. 2. It imposes liability upon the United States for the private, even unlawful, conduct of an employee on the sole ground that the employee was using a government-owned instrument with the permission of his superiors, despite the fact that this permission was wrongfully obtained.

The decision thus lays down a general rule of

federal law construing the Tort Claims Act [4] that is in conflict (1) with the principles applied by other courts of appeals, which have held the Act to limit liability to cases where the employee was engaged in the Government's business as distinguished from his personal affairs,[5] and (2) with the authorities at common law, which likewise require that the employee's activity be connected with his employer's work. A. L. I., *Restatement of Agency*, §§ 219, 235. A decision by this Court as to the correctness of this rule is of great importance to the Government. The unfortunately recurring problem presented by servicemen who avail themselves of government vehicles for private pleasure trips and escapades is already reflected in a number of reported decisions.[6] The existence of almost

[4] "We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an 'employee of the Government * * * acting within the scope of his office or employment'." *United States* v. *Sharpe*, 189 F. 2d 239, 241 (C. A. 4); *Williams* v. *United States*, 105 F. Supp. 208 (N. D. Cal.); *cf. Feres* v. *United States*, 340 U. S. 135, 142-144; *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305-307, 311. The district court erroneously applied New York law on the scope of employment (R. 147).

[5] *United States* v. *Eleazer*, 177 F. 2d 914 (C. A. 4), certiorari denied, 339 U. S. 903; *United States* v. *Sharpe*, *supra*, note 4; *Hubsch* v. *United States*, 174 F. 2d 7, 9 (C. A. 5), remanded for settlement, 338 U. S. 440; *cf. Sanchez* v. *United States*, 177 F. 2d 452 (C. A. 10); see *United States* v. *Hull*, 195 F. 2d 64, 67 (C. A. 1); *Williams* v. *United States* supra, note 4.

[6] See, *e. g.*, *Hubsch* v. *United States*, *supra*, note 5; *Williams* v. *United States*, *supra*, note 4; *Long* v. *United States*, 78 F. Supp. 35 (S. D. Cal.); *Greenwood* v. *United States*, 97 F. Supp. 996 (W. D. Ky.); *Clemens* v. *United States*, 88 F. Supp. 971 (D. Minn.); *Stekovich* v. *United States*, 102 F. Supp. 925 (M. D. Pa.); *cf. Murphey* v. *United States*, 179 F. 2d 743 (C. A. 9), reversing 79 F. Supp. 925 (N. D. Cal.); *United States* v. *Johnson*, 181 F. 2d 577 (C. A. 9).

100,000 military vehicles and as many civilian federal agency vehicles operating within the United States[7] assures a considerable burden of liability if the "scope of employment" is held to be automatically and conclusively established once formal approval is shown.

The court below did not elaborate its reasons for approving the exclusion of evidence as to the real purpose for the trip. However, the apparent bases and necessary implications of this ruling serve to demonstrate its error.

1. Under the "permissive use" statutes of New York (Vehicle and Traffic Law, § 59, quoted at R. 144) and some other jurisdictions,[8] an owner is liable for the negligence of a person he permits to use his vehicle, regardless of whether the use is for the owner's business or benefit.[9] Pointing out that the district court had held this statute applicable to the United States, the court below declared that it had no occasion to consider the correctness of this holding (R. 167, n. 2). Despite this declaration,

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[7] See *Annual Motor Vehicle Report for the Fiscal Year ended June 30, 1951*, General Services Administration, Federal Supply Service, February, 1952, p. viii; 61 Yale L. J. 435, 442, n. 25. For the fiscal year 1951, 331 of the 736 cases filed under the Tort Claims Act were for personal injuries arising out of motor vehicle accidents. *Annual Report of the Director of the Administrative Office of the United States Courts, 1951*, p. 130.

[8] *E. g.*, D. C. Code (1951 ed.) § 40-403.

[9] In the absence of statute, an employer is not liable for a permissive use not in furtherance of his business. *Balinovic* v. *Evening Star Newspaper Co.*, 113 F. 2d 505 (C. A. D. C.), certiorari denied, 311 U. S. 675; *Reilly* v. *Connable*, 214 N. Y. 586; *Irwin* v. *Klein*, 271 N. Y. 477, 483; A. L. I., *Restatement of Agency*, § 238, Comment b.

the decision below amounts to an application—and, indeed, an extension—of the permissive use doctrine under the Tort Claims Act. For in holding it to be irrelevant that the driver in this case had fabricated an official mission and was actually driving on a frolic of his own, the court has made mere "permission" of a superior to use the vehicle sufficient to establish the Government's liability. And even under the permissive use statutes, the extent and nature of consent is material and open to investigation [10]—a factor which would make it highly relevant that the superiors of the soldier had neither the power nor the intention to authorize a drinking expedition.[11]

What is primarily significant here is the fact that the permissive use doctrine, whether or not it could extend to non-government cases of consent fraudulently obtained, has no place under the Tort Claims Act, and has been repeatedly rejected in decisions under the Act.[12] These decisions—observing the Act's specific limitation of the Government's liability to cases where injuries are caused by an employee acting within the scope of his em-

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[10] *Chaika* v. *Vandenberg*, 252 N. Y. 101; *Henrietta* v. *Evans* 10 Cal. 2d 526.

[11] As federal law prohibits use of a government vehicle except for government business (5 U. S. C. 78(c)(2); 59 Stat. 131; Army Regulations No. 700-105, par. 26c, 30 June 1948), proper consent to use by service personnel could only be based on a judgment that the purpose was substantially governmental.

[12] *Hubsch* v. *United States*, *supra*, note 5; *Williams* v. *United States*, *supra*, note 4; *Long* v. *United States*, *supra*, note 6; *Cropper* v. *United States*, 81 F. Supp. 81 (N. D. Fla.); see *United States* v. *Hull*, 165 F. 2d 64, 67 (C. A. 1).

ployment, and recognizing t that this limitation requires adherence to settle d principles of *respondeat superior*—are fun damentally irrecon-cilable with the decision bel ow. They illustrate what the plain statutory te rms would seem to make amply clear—that Co ngress has deemed only acts within the scope of employment to be fairly chargeable to the cos t of operating the military and civilian establis hments.[13] In holding that a proper "claimed p urpose" of the employee meets this test, preclu ding inquiry into the actual purpose and nature of the activity, the decision below drastically exte nds the limits of the liability to which Congress co nsented.

The Act as written imposes upon plaintiffs the burden of proving that the o peration of the conveyance was within the scope of the driver's employment. For reasons of co nvenience it may be fair as well as consistent with the statutory scheme to require the Government, as the owner presumably in possession of the facts, to negative the presumption that the vehicle was operated on its behalf and within the scope of the employee's employment.[14] But a doctrine relieving plaintiffs from

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[13] *Cf. Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 221; *Reilly* v. *Connable*, 214 N. Y. 586, 590; see Smith, *Frolic and Detour*, 23 Col. L. Rev. 444, 461, 463 (1923).

[14] Wigmore, *Evidence* (3d ed.) §2510a; Fegan, *Presumption versus Proof in Automobile Highway Accidents*, 22 Geo. L. J. 750 (1934); *Potts* v. *Pardee*, 220 N. Y. 431.

It is universally agreed that the inference that the car was driven in the exercise of authority may be rebutted and overcome. *Watson* v. *United States*, 90 F. Supp. 900 (D. Alaska); *Simon* v. *City Cab Co.*, 78 F. 2d 506 (C. A. D. C.), certiorari denied, 296 U. S. 640; *Walsh* v. *Rosenberg*, 81 F. 2d

proving, or preventing the Government from disproving, that the conduct was within the scope of employment, dispenses with proof of a material fact[15] and, in the guise of a mere ruling on evidence, nullifies a policy implanted in the heart of the Act.[16] The court below apparently recognized (R. 166-167) that, where an agent who has embarked on the principal's business deviates for purposes of his own, the principal is not liable for tortious conduct during the period of the deviation. It should follow, *a fortiori*, that the employe in this case, if his whole trip was for a trumped-up official purpose, was never on government business.[17]

2. To the extent that its decision is grounded in the belief that formal, apparent authority to be on the road conclusively established that the employee was acting within the scope of his employment, the court below misapplied and overextended rules from the law of agency designed for situations where third persons rely on appearances in dealing

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559 (C. A. D. C.), certiorari denied, 298 U. S. 663; *Pariso* v. *Towse*, 45 F. 2d 962 (C. A. 2); *Department of Water & Power* v. *Anderson*, 95 F. 2d 577, 583 (C. A. 9), certiorari denied, 305 U. S 607; *St. Andrassy* v. *Mooney*, 262 N. Y. 368 (New York permissive use statute); *Rose* v. *Balfe*, 223 N. Y. 481, 486; cf. *Del Vecchio* v. *Bowers*, 296 U. S. 280; see *Fegan*, *supra*, at 770.

[15] Cf. *United States* v. *Ross*, 92 U. S. 281, 285.

[16] See *United States* v. *Campbell*, 172 F. 2d 500, 503 (C. A. 5), certiorari denied, 337 U. S. 957.

[17] *Cohen* v. *City of New York*, 215 App. Div. 382, affirmed, 243 N. Y. 561; *Graves* v. *Utica Candy Co.*, 209 App. Div. 193; *Campbell* v. *Warner*, 234 N. Y. 645, reversing 200 App. Div. 888; *Cf. Hanchett* v. *Wiseley*, 107 Cal. App. 230; *Cannon* v. *Goodyear Tire & Rubber Co.*, 60 Utah 346.

with the agent on a business basis.[18] Apart from the fact that doctrines of estoppel and apparent authority are inapplicable to government operations,[19] they cannot serve to preclude proof that the employee was engaged in purely personal pursuits in the kind of tort situation this case presents. For there is no basis for suggesting here, or in any other collision case, that injured parties have changed their position or submitted to injuries in reliance upon the apparent authority of the driver. See A. L. I., *Restatement of Agency,* § 216, Comment a, § 238, Comment a, § 265.

3. The court below undertakes (R. 166) to distinguish *King* v. *United States,* 178 F. 2d 320, 322 (C. A. 5), certiorari denied, 339 U. S. 964, which rejected a claim under the Tort Claims Act for damages caused by a crashing airplane, holding that, since the airman involved had taken the airplane without the knowledge or consent of his superiors, he was not acting within the scope of his employment. But the vehicle obtained by fraud resembles in this respect the stolen vehicle.[20] The

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[18] Cf. *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757 (C. A. 2); *Standard Surety & Cas. Co.* v. *Plantsville Nat. Bank*, 158 F. 2d 422, 424 (C. A. 2). The imposition of liability for acts within an agent's apparent authority is grounded on estoppel. *Gosney* v. *Metropolitan Life Ins. Co.*, 114 F. 2d 649, 652 (C. A. 8); *Berryhill* v. *Ellett*, 64 F. 2d 253, 255 (C. A. 10).

[19] *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380; *Whiteside* v. *United States*, 93 U. S. 247.

[20] *Fluegel* v. *Coudert*, 244 N. Y. 393; *Cannon* v. *Goodyear Tire & Rubber Co.*, 60 Utah 346; *cf. Pennsylvania Indemnity Fire Corp.* v. *Aldridge*, 117 F. 2d 774 (C. A. D. C.); *Peabody* v. *Marlboro Implement Co.*, 72 F. 2d 81, 84 (C. A. D. C.), certiorari denied, 293 U. S. 601; A. L. I., *Restatement of Torts*, § 221(b).

decisive fact against liability in either case is that the employee is "on a frolic of his own, and * * * not in any manner serving the interests of the United States." *King* v. *United States, supra,* at 322. Unless the formality of official "permission," regardless of the manner in which that permission is obtained and misused, does duty as a substitute for actual service in the Government's behalf, the decision below conflicts with *King* as it conflicts with the other decisions we have cited (*supra,* p. 9, n. 5) holding that an employee engaged in his own pursuits is not acting within the scope of his employment for purposes of the Tort Claims Act.

4. The decision below, in its unprecedented expansion of the scope-of-employment concept, judicially repairs what has frequently been regarded as one of the shortcomings of the *respondeat superior* rule.[21] It substitutes a test of "initial permission" that has been recommended as an amendment to the Tort Claims Act to approximate the protection of modern automobile liability insurance.[22] But it has been conceded by those recommending this change that legislation is necessary to achieve it and that, despite the agitation for

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[21] *Cf. Young* v. *Masci,* 289 U. S. 253, 259.

[22] *Respondeat Superior in Automobile Negligence—An Anomaly in the Federal Tort Claims Act,* 61 Yale L. J. 435, 442-444 (March, 1952). "Under this 'initial permission' test, once the Government checked out a vehicle to a driver, liability for his negligence on unauthorized departures from official business would automatically follow. In effect, the Government would assume accident responsibility for the negligent use of its vehicles in virtually any case short of conversion." *Id.* at 443.

a broader owner liability, Congress selected the traditional scope-of-employment test.[23] Policy considerations favoring a rule which would "provide plaintiff with a financially responsible defendant"[24] cannot force the line of development which is for the legislature, but must bow to the restrictions Congress has up to now attached to the assumption of governmental liability. These restrictions have been ignored in this case, and there is need for their sharp definition and reaffirmation by this Court until such time as the Congress, on due deliberation, may choose to ease them by discarding or modifying the rules of *respondeat superior*.[25]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

SEPTEMBER, 1952

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[23] *Id.*, at 442-444.

[24] James, *Accident Liability: Some Wartime Developments*, 55 Yale L. J. 365, 399 (1946); *cf. Guy* v. *Donald*, 203 U. S. 399, 406.

[25] *Cf. United States* v. *Standard Oil Co.*, 332 U. S. 301, 315-317; *Potts* v. *Pardee*, 220 N. Y. 431, 433; *Van Blaricom* v. *Dodgson*, 220 N. Y. 111, 116-117. "A full and complete remedy * * * must come from appropriate legislative action." Grad, *Recent Developments in Automobile Accident Compensation*, 50 Col. L. Rev. 300, 305 (1950). If there is a real problem, judicial tinkering with the bases of liability may obscure the need and delay legislative correction on a comprehensive scale.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 369

THE UNITED STATES,

Petitioner,

v.

GLADYS E. McCONVILLE, Administratrix of the Goods, etc., of FRANK J. McCONVILLE, Deceased, for and in behalf of herself as Widow and JAMES McCONVILLE, Next-of-kin and Heir at Law of the Decedent, and GLADYS E. McCONVILLE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COPAL MINTZ,
GEORGE A. GRABOW,
MEYER DVORKIN,
Counsel for Respondent.

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BRIEF IN OPPOSITION

To the petition of the United States for writ of certiorari to the United States Court of Appeals for the Second Circuit to review that court's judgment, entered July 2, 1952, affirming (with the elimination of a $20 item of costs) a judgment for $60,800 plus costs in favor of the respondent rendered by the District Court of the United States for the Eastern District of New York, on August 13, 1951.

I

The question propounded in the petition (at p. 2) is not presented by the record, and it is without merit.

(1). The trial court found (R. p. 150), and the Court of Appeals unanimously affirmed (R. pp. 165-167), that the United States Army truck, the negligent operation of which caused the damage, at the time of such damage,

> "was operated by then Sergeant John R. Anderson, with the permission and *in behalf and in the business of the defendant, in the line of his duty and within the scope of his employment.* Said truck had been duly issued to him by the defendant, in due and regular course, at its Army base at Mitchel Field, within the State of New York, for the purpose of proceeding to a specific warehouse to procure and convey therefrom property of the defendant. At the time of the said occurrence the said John R. Anderson was driving the said truck to the said warehouse" (Finding of fact # 6; emphasis supplied).

The facts thus found were established conclusively not only by the uncontradicted testimony of Sergeant Anderson but also by the officially issued "Driver's Trip Ticket" introduced in evidence by the defendant (Defendant's Exhibit G, R. p. 99) and other evidence introduced by the defendant as mentioned below. That the dispatch of army vehicles to the Santini warehouse and other places in the early hours of the morning was a regular procedure is indicated by the "Gate Sheet", included in Defendant's Exhibit H (see 54th p. thereof), which showed the dispatch of eight other army vehicles, on the same morning, between midnight and 5:10 A. M., *two of which were also to Santini's*—one at 0.05 and the other at 2.05—and the other six were to "Post" "Hempstead" "Freeport" "Bayside Avenue".

Immediately after the accident the army officials made a thorough investigation which included the interrogation of all of Sergeant Anderson's companions. After the army authorities were apprised of the institution of this action and the demand therein of $375,000, court-martial charges against Anderson were ordered on December 1, 1948 (Defendant's Exhibit H, 19th p.). The charges which followed, on December 7th (id. 2nd p.), on the basis of the thorough investigation which had been conducted, were that Anderson had misused a military vehicle *which had been duly dispatched to him "by deviating from the route authorized"*—the converse of a wrongful inducement of the authorization or order. Anderson was subsequently tried and convicted of that charge.

Anderson *never* was charged with having obtained the motor vehicle by fraud or misrepresentation or other illegal means (see the charges at p. 2 of Defendant's Exhibit H, the Judge Advocate's "review" of the "record of the trial" and his approval of the findings on the 9th and 10th pages thereof; also the outline of evidence for submission at the court-martial trial on the 60th p. of Exhibit H).

It was the petitioner who introduced in evidence the entire court-martial record and the dossier pertaining thereto, including the entire investigation (R. p. 106).

(2). Manifestly, the found facts, quoted above, based upon the uncontradicted evidence in the record, do not give rise to the question formulated on page 2 of the petition. The facts present neither the question of liability for the negligence of "an employee driving a government vehicle *solely* for his own private purposes"[1], nor of an employee who "*obtained* permission of his superiors to use the vehicle *through fraud.*"

---

[1] We discuss this phase more fully at pages 14-16 *infra*.

(3). It follows therefore, that the "primary issue", if there is any, is something else. In truth, petitioner's "primary issue" is nothing more than the correctness of the trial court's exclusion of certain questions on the direct examination of two of the driver's (Sergeant Anderson's) companions called as witnesses for the defendant.

What questions of law are necessarily presented for consideration by the exclusion of the proffered testimony? If, as seems to us abundantly clear, the rulings were correct for reasons other than the one challenged in the petition, the question raised by the petition is not necessarily presented—indeed, is immaterial.

Hence, the setting and context of the questions must be looked into.

The first important fact is that the excluded questions came after Sergeant Anderson testified and was cross-examined and the defendant had introduced the court-martial record and all papers pertaining thereto, Defendant's Exhibit H.

Sergeant Anderson was cross-examined as to the genuineness of the officer's request for a bed and mattress and (over objection) as to whether that was not a "fabricated story" to procure a vehicle for the sole purpose of going to town with companions (R. pp. 88-93; 97-102). When *Anderson reaffirmed the bed and mattress testimony,* defendant introduced the record of and pertaining to Anderson's trial by court-martial, with the implied representation that Anderson had been "charged by the Army" with obtaining the motor vehicle in question "illegally and by fraudulent means" and had been found guilty thereof (R. p. 104)—which is not at all what the court-martial record showed. The court received that record over plaintiff's objection (R. pp. 104-5)—apparently, on the theory that it constitutes *prima facie* evidence of the facts therein

found (see *Walther* v. *News Syndicate Co., Inc.*, 276 App. Div. 169 (1949) and cases therein discussed).

That court-martial record (Defendant's Exhibit H), however, confirmed Anderson's testimony, for, after full investigation, as already noted (at p. 3 *supra*), Anderson was charged with, tried for, and convicted of *not* "obtaining the motor vehicle in question illegally and by fraudulent means", but misusing a military vehicle which had been *duly dispatched* to him "*by deviating from the route authorized*".

Thus, by the record as well as by the cross examination of Anderson, the defendant had affirmatively negatived the allegation in its answer that Anderson "had procured the vehicle without proper and legal authority and by fraud and misrepresentation".

After having done that, defendant called Sergeant Frank W. Brenner. After testifying that he had seen Sergeant Anderson on the night of October 11, 1948 at the recreation hall between 10:30 and 11:00 P. M. and again twenty or thirty minutes later in the barracks (R. ff. 252-3), Brenner said that Anderson said nothing in the barracks and that he couldn't remember at whose suggestion he went with Anderson into the motor vehicle (R. f. 253). Thereupon he was shown his statement of October 12, 1948 which was part of the court-martial record (Defendant's Exhibit H); but it did not serve to refresh his recollection (ff. 253-4). Then came the following questions to which the court sustained objections (ff. 254-256):

> "Q. Now, did you hear any conversation about taking a ride in the motor vehicle?"
>
> "Q. Did you hear Anderson say anything about going on a ride?"
>
> "Q. Did Anderson ask you to come along with him?"

"Q. Did you at any time know that you were going to Oceanside?"

"Q. Did you know that you were going to Santini's warehouse?"

"Q. Did you hear anyone say anything about a mattress or cot—"

As its next witness, the defendant called another of the soldiers who had accompanied Anderson on the truck on its way out from the base, Robert F. Goodman. In the course of his direct examination, objections were sustained to the following questions (ff. 257-8):

"Q. Now before you went into the motor vehicle, was there any talk about the use of the motor vehicle?"

"Q. Did you have any conversation with Anderson before the motor vehicle was brought to the barracks?"

"Q. When you got into the motor vehicle, did you get into it for the purpose of going any particular place?"

"Q. Did you intend to go to Santini's warehouse?"

No rulings other than the exclusion of those questions are involved here.

(4). It must be remembered that there already was in evidence the statements which these witnesses had made to the army authorities immediately after the accident and also the testimony which they had given at the court-martial. All of that was included in Defendant's Exhibit H which had been received in evidence (R. p. 106).

Assuming, *arguendo*, that the excluded questions were competent, as they were not (see p. 8-10 *infra*), and reasonably calculated to elicit the reiteration by Brenner that

before Anderson had left to get the truck "it was understood * * * that we would go to Hempstead. Anderson suggested it" and by Goodwin that there had been talk "about going into town to get something to eat" and "the question was brought up about getting a vehicle to go to town" but he "didn't remember too much of what happened"—would such vague and nebulous reiteration have affected the decision?

Even if competent, could such restatement have served to establish that there had been no request for a bed and mattress and that the Officer of the Day who directed the issuance of the vehicle, and the army intelligence officers who investigated immediately after the accident had been hoaxed and that Anderson had been mischarged, mistried and misconvicted?

The answer to the contrary is found in the decision of the trial court, for, as already noted, he had before him the statements which the two soldiers had made. Moreover, the utter improbability that any reasonable trier of the facts could give such testimony any outweighing force, probably is what the Court of Appeals had in mind in concluding that (R. p. 167):

> "Refusal of the testimony, therefore, could have been of no prejudice to the Government in this case tried by the court without a jury."

In our brief to the Court of Appeals, we stated on this point (at pp. 46-47 of the Appellee's Brief):

> "Even if the proffered testimony be viewed as legally relevant and competent and not insufficient, it is apparent that it is of so unsubstantial a nature and content that its receipt would not, and properly could not, have affected the result. Since, upon full consideration thereof, the command at Mitchel Field did

not deem itself duped and the Judge Advocate's Department perceived therein no basis for a charge that the command had been duped, how could that very same evidence lead a court to override the determination of the responsible officers and conclude that, in fact, they had been duped and were obtuse or careless in failing to so appraise and evaluate the referred to soldiers' statements? On the contrary, the *prima facie* presumption that the officers properly discharged their duty must lead to the conclusion that they had inquired into the genuineness of Anderson's statement that an officer had asked him for a bed and mattress, and had found that to be true. That inference is strengthened by the fact that nowhere in Defendant's Exhibit H is there a suggestion that there was any doubt of the veracity of Anderson's statement in that regard.

Therefore, even if * * * it be held that technical error was committed in excluding the proffered testimony, the error manifestly was insubstantial and harmless."

It is manifest from the above quotation from the opinion of the Court of Appeals that that Court agreed with the foregoing appraisal.

Therefore, it is submitted that the substantive question which the petition seeks to have this Court consider, is not necessarily presented by this record since *the probative force*, if any, of the excluded testimony is so *negligible* and so overwhelmed by the other evidence that, in any event, *no material error was committed.*

(5). Moreover, the excluded questions were incompetent, as a matter of law, irrespective of the abstract substantive question raised by the petition. They were incompetent on at least four grounds:

(a). Before embarking on the referred to line of testimony, the defendant itself, as already noted, in its Exhibit H, had established that after gathering all of the referred to testimony and in the face of it, the Army authorities—six weeks after completion of the investigation and with knowledge of this McConville action—reaffirmed the propriety and regularity of the issuance of the truck and the Army mission on which it had been dispatched. The sole wrongdoing, it was held, was in "deviating from the route authorized and going to Oceanside" instead of directly to Santini's warehouse and back.

Thus, defendant itself had offered conclusive proof that after full inquiry and with knowledge of the statements of the participants and with no less information or knowledge than that possessed by defendant's counsel at the trial of this case—the military authorities did not repudiate the issuance of the truck, and, on the contrary, had affirmed it.

(b). The proffered testimony not only was in contradiction of that deliberate reaffirmation of the command; it was in contradiction also of the judgment which defendant itself had introduced as evidence in its favor. The judgment and evidence in contradiction thereof (or at variance therewith) could not both be credited. Defendant had to make a choice whether to seek the benefit of the judgment and of the evidence on which it was based, on the one hand, and, on the other, evidence in conflict therewith. When defendant introduced the court-martial judgment and the proceedings which resulted therein, it made the choice and thereafter, we submit, could not offer evidence to discredit it—at least not without withdrawing (with leave of the Court) the previous evidence.

(c). The proffered testimony was incompetent for the further reason that it was not of contemporaneous declarations by Anderson in illumination of his then purpose. The defendant's offer consisted only of declarations by others than Anderson. Those, we submit were not competent as evidence of Anderson's state of mind and motivation nor as evidence that, in fact, there had been no officer's request for a bed and mattress.

(d). Finally nothing in the October, 1948 statements of Goodwin and Brenner or of any one else, if repeated on the witness stand and believed, would have contradicted Anderson's testimony that he had been asked by an officer to procure a bed and mattress and that it was to procure that bed and mattress that he applied for and was issued the truck. Expression of a desire for a vehicle to go to town is not inconsistent with—and, therefore, does not disprove—a request by an officer for a bed and mattress. Proof of such talk would prove only that the officer's request came at a very welcome time. Fraud, calculated trickery, are not presumed or to be lightly found. Such grave misconduct must be established by convincing proof. Therefore where evidence relied on to establish it is reconcilable with innocence and with the testimony of the alleged wrongdoer and there is no inconsistency, the evidence is insufficient for a finding of fraud (*Lynch* v. *Gibson,* 254 App. Div. 47, 51, aff'd 279 N. Y. 634; *Lowendahl* v. *Baltimore & Ohio Ry. Co.,* 247 App. Div. 144, 158).

For all of the above reasons, we believe that the substantive question raised by the petition is not reached and is not presented here.

(6). Beyond that, we submit that *there is no reasonable basis for the position urged by the petitioner that an*

owner of a motor vehicle who sends it out on the public highways under a mandate to go to a specific place for a specific purpose is not responsible for the ensuing operation of that vehicle if he had been misled or tricked into authorizing or directing the errand.

It is noteworthy that the petitioner cites no authority in support of its contention. If there were validity in it, that proposition of law would have been laid down long ago.

The only conceivable basis for the contention is analogy to the right in contract law to rescind for fraud. But the well settled limitations upon that right preclude its invocation as a defense against an injured innocent third party.

A contract may be rescinded for fraud only when such fraud is practiced by and chargeable to the other party to the contract; the fraud of a third party can not serve to impair the binding effect of the contract (Restatement, Contracts, Sec. 477; 5 Williston Contracts Sec. 1518; *Conrow* v. *Little*, 115 N. Y. 387 (1889)).

Even when defrauded by the other party to the contract, a right to rescind is lost unless exercised promptly after discovery of the facts and *restoration of the status quo ante* is possible and offered (*Brennan* v. *National Equitable Investment Co.*, 247 N. Y. 486 (1928); *Marr* v. *Tumulty*, 256 N. Y. 15 (1931); *N. Y. Telephone Co.* v. *Jamestown Telephone Corp.*, 282 N. Y. 365, 372-3 (1940)).

In no event may there be disaffirmance or rescission to the prejudice of third parties (*Paddon* v. *Taylor*, 44 N. Y. 371 (1871); *Conrow* v. *Little, supra; Marr* v. *Tumulty, supra*).

Hence, *ex post facto* disaffirmance or rescission cannot serve to, and does not, free a party of obligation or liability already incurred to innocent third parties.

The plaintiff is such an injured innocent third party. It is not possible to permit the defendant to disaffirm or rescind and at the same time restore the plaintiff to her *status quo ante*. If the order had not been issued, the truck would not have been out and the accident would not have occurred. At best, the defendant could have rescission only on condition of indemnification of the innocent plaintiff whose injuries flowed from the issuance of the order; and indemnification is all that the judgment provides for.

The assimilation glibly suggested in the petition (at p. 14) of fraud to theft, disregards the basic difference between them in respect to liability to third parties that is emphasized in every branch of the law. One whose car is stolen, like one from whom negotiable instruments are stolen or one from whom an undelivered locked-up executed document is burglarized, does nothing from which liability can flow—he is not an actor in any sense. On the other hand, one who does act, voluntarily and deliberately, however mistakenly or misled, is an actor who can not shake off responsibility for the consequences of his act (however induced) to innocent others; indeed, as we have seen, even as to those who defrauded him—as distinguished from thieves—he can be relieved only if he repudiates promptly after discovery and offers restoration of the *status quo ante*.

If not already fully evident, the falaciousness of the petitioner's contention perhaps is exposed more clearly by a consideration of several concrete examples.

Suppose a construction contract is entered into through fraud practiced on the contractor, the latter orders material and employs workmen, and thereafter discovers the fraud and cancels the contract. Thereby does he shake off liability to the workmen and suppliers or for torts committed by the contractor's employees during the prosecution of the work?

Suppose an innocent person is injured while fire apparatus is rushing to respond to an alarm. Does it make any difference whether the alarm was genuine or was unlawfully set off by someone for insidious personal reasons, even if that be at the instance of the driver?

Suppose a commanding general sends trucks to a dock to pick up supplies which he had been told are there for his post, and, on the way, some one negligently is run down, is there no liability if it develops that the message to the general was a hoax?

The answer to the above questions obviously is "no". So here, as far as concerns third persons on the highway, it is wholly immaterial how the authorization and direction of the issuance of the vehicle came about, so long as its issuance was authorized and directed by due authority. Whether or not the constituted authorities acted mistakenly or had been duped is immaterial.

Hence, it seems to us clear beyond reasonable challenge that the Court of Appeals was eminently correct in holding that evidence on whether or not the issuance of the order to Anderson had been induced by falsity on his part had "no bearing on the scope of Anderson's employment", as against third parties on the highway who were injured by the negligence in the execution of that order. A contrary holding that an employer is not liable for the negligence of his employees in the execution of assigned tasks where he had been duped into ordering those tasks, even though the deception be not chargeable to the injured persons, would have been an indefensible innovation at war with settled principles.

(7). The only basis for the petition to this court to consider this contention seems to be the novelty thereof. It is respectfully submitted that novelty alone does not suffice to invoke this court's consideration; at the very least there

should also be merit, even if not, as is usually required, a conflict in the authorities.

In this connection it is noteworthy that the petition seems to assume that if liability here were grounded on permission to use rather than on *respondeat superior,* the claimed fraud would be immaterial. But if fraud by the employee vitiates the instructions of his employer, why would it not equally vitiate permission secured from an owner? The petition, therefore, argues not for an observance of the distinction between the *respondeat superior* rule and the "permission" rule—a point not at all involved in this case as decided by the Court of Appeals—but for elimination, under either test, of liability to injured third parties where the owner's direction or authorization to use the vehicle results from imposition on him. We respectfully repeat that such a doctrine is completely at war with settled law.

II

The alleged errors specified in the petition do not merit review by this Court.

1. What is said above, we feel, adequately demonstrates that, in the circumstances of this case, the claim of "fraud" —specified as the basis of the first claim of error (p. 7)— is not necessarily presented by the record and, in any event, is too wanting in merit to earn this Court's consideration.

2. The secondary contention that at the time of the accident Sergeant Anderson was not acting within the scope of his employment or "in the line of duty" because of the anterior deviation, likewise, we respectfully submit, does not merit review.

The petition points to no conflict between the decision herein and the decisions in other circuits, nor to other con-

fliet of authority. On the contrary, the decision herein is directly in accord with that of the Ninth Circuit Court of Appeals in *Murphey* v. *United States*, 179 Fed. 2d 743 (1950), *United States* v. *Johnson*, 181 Fed. 2d 577 (1950), and *United States* v. *Wibye*, 191 Fed. 2d 181 (1951)—all involving the use of army vehicles. It is noteworthy that in each of those cases the government accepted the adverse judgments without applying for certiorari. The decision herein is in accord also with the District Court decisions in the army vehicle cases of *Lowe* v. *United States*, 83 F. Sup. 128, *Siciliano* v. *United States*, 85 F. Sup. 726 and *Watson* v. *United States*, 90 F. Sup. 900. In each of those the government accepted adverse judgments without seeking review even by a Court of Appeals.

The decision of the Court of Appeals for the Fifth Circuit is *Hubsch* v. *United States*, 174 Fed. 2d 7, is not *contra* to anything held in this case. The *Hubsch* case is not at all in point, for there the accident occurred while the soldier was driving to a restaurant for breakfast in the course of a week-end holiday for his own private enjoyment totally divorced from any official mission. Yet even there the decision against liability was deemed by this court worthy of review, for certiorari was granted in 338 U. S. 814. There the government had the opportunity to have settled by this court the impact upon liability under the Federal Tort Claims Act of state statutes broadening the liability of owners of motor vehicles. The government, however, deliberately elected not to risk, and to avoid, such an authoritative settling decision by making an out-of-court settlement of the case (338 U. S. 440).

The antecedent deviation from the authorization or order in this case was substantially less than in any of the cases referred to above. Therefore, in the light of the Government's election not to seek review in any of those cases,

it is not easy to perceive why the Government should seek review in this case.

Perhaps it is not amiss to emphasize that the accident here occurred while Anderson was driving to the warehouse to accomplish the mission on which he had been dispatched. However wayward he had been previously, at that time he was attending to duty, and doing so exclusively. Never, after he started from the base, was he free of the double duty of going to Santini's and of returning the truck to the base. Until accomplishment, he was under a continuing duty to address himself to those tasks; having strayed therefrom, he was under a continuing duty to cease his deviation and return to duty. When he did so and while he was driving the truck to Santini's and thence to the base, he certainly was serving the United States and performing his line of duty, however remiss he had been prior thereto. Otherwise, it would have to be said that having strayed from the authorized mission, it was his duty to abandon the truck wherever he had taken it. That, of course, is contrary to common sense.

In deciding the case as they did, the courts below followed precedent to such an extent that petitioner does not cite any conflicting authority. The *factual situations* in *King* v. *United States*, 178 Fed. 2d 320 (C. A. 5), c.d. 339 U. S. 964, and in the other cases relied on by the petitioner, place those cases in a category entirely different from this case, as the Court of Appeals noted in its opinion (R. p. 166).

3. The third specification of error that the Court of Appeals "erred in affirming the judgment of the District Court" (p. 8) is a generalization which presents no specific point for consideration.

III

The decisions below are eminently just.

It is eminently fair that when the United States uses the highways of a state, it should do so on the same terms of liability towards the others on the roads as are imposed by the state generally. Equality of liability is so plainly fair and, under modern conditions, so socially desirable, that Congress provided for the discharge of that moral and economic obligation by not only providing for liability but stipulating that (with exceptions not material here) the United States shall have the same liability as "a private person . . . in accordance with the law of the place where the act or omission occurred" (28 U. S. C. 1346(b)) and "in the same manner and to the same extent as a private individual under like circumstances" (id. 2674).

The dispatch of the truck, in the early hours of the morning, with companions who had been drinking and who, in accordance with regulations, were permitted to go along "for the ride" (R. pp. 64-6, 91-3, 101-2), exposed the public to extra hazards, for which it is but fair that the citizenry, in whose behalf it was done by its responsible officers, should bear collective responsibility. No doubt, the established procedure of allowing companions "for the ride" was in furtherance of the army's concern and necessity to promote the morale of its men. That promotion of morale was in the service of the United States and affords added reason for collective liability and against imposing the consequent damage upon the hurt innocent individuals.

That the accident here was caused solely and exclusively by the negligence of the driver of the army truck was demonstrated to a mathematical certainty. Defendant no longer contends otherwise. The evidence showed conclusively that the driver disregarded a four-second amber

light warning and then ran through a red light at a high speed; even with those transgressions, he would have avoided the accident if he had, as he should have, travelled to the extreme right of a four-lane road instead of toward the center. The place where the collision occurred and the presence of the traffic light "tripper" objectively proved all of that beyond controversy.

It is equally certain that the deceased was free of any negligence, as is made abundantly clear in the opinion of the Court of Appeals (R. p. 165). Totally unwarranted is the slur in the petition (at p. 4) that the decedent "had been driving while intoxicated". That was disproved not only by the uncontradicted testimony of Mrs. McConville (R. pp. 31-5, 42, 45, 47, 52-3), referred to in the opinion of the Court of Appeals (R. p. 165), but also the concessions of the toxicologist called as a witness by the defendant (R. pp. 77, 85) and by the defendant's failure to call a single one of the numerous persons who would have been able to testify to the decedent's intoxication if that were the fact, for he had just been in the company of numerous persons at a yacht club party (R. pp. 32, 42).

In fairness, then, why should not the decedent's widow and son be paid their economic loss? The human loss, of course, is beyond reparation.

IV

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

COPAL MINTZ,
GEORGE A. GRABOW,
MEYER DVORKIN,
Counsel for Respondent.

October 28, 1952.